No. 7922

Supreme Court, U.S.
FILED
MAR - 8 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

DELL O. McCUAIG - PETITIONER

vs.

OFFICE OF PERSONNEL MANAGEMENT - RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Dell O. McCuaig
P.O. Box 443
Quilcene, WA 98376
(206) 765-4621

17pp

QUESTION PRESENTED

What is the proper current interpretation of Public Law 95-366 (section 8345 (j) of title 5, United States Code)?

Subsequent to enactment of the law, the Supreme Court of the United States determined that federal annuities are compensation. Notwithstanding the non-property nature of federal annuities, the executive branch through the OPM has interpreted and administered the law to empower a state to arbitrarily determine that a federal annuity is property and to bind the federal government accordingly.

Therefore, although a federal annuity may be property for the benefit of a divorced spouse of an annuitant, the annuity may not be property for the benefit of a current spouse of an annuitant or of an annuitant.

Neither the Supreme Court "Compensation" definition nor this inequity between a divorced spouse and a current spouse could

have reasonably been foreseen by those responsible for the enactment of the law.
It is my contention that the OPM's failure to timely address and resolve these issues left the OPM without the undisturbed authority to withhold any annuity amounts from me.
It has been stated, in defense of the OPM, that that agency is not permitted to look beyond the court order. In my case, the state's property basis is revealed within the order.

TABLE OF CONTENTS

Jurisdiction. 1

Statement of the Case 1

Argument for Writ. 4

United States Court of Appeals for the Federal Circuit Judgement Dated Dec. 15, 1992 . . . . . A-1

Qualified Domestic Relations Order Dated Nov. 14, 1990 . . . . . B-1

JURISDICTION

The jurisdiction of this court is invoked as it has the final authority to interpret the law.

STATEMENT OF THE CASE

The Washington State Court Qualified Domestic Relations Order No. 88-3-09411-1 Dtd. 14 Nov 1990 (APPENDIX) was delivered to the OPM. This order was pursuant to Washington State Law governing division of marital property. The order provided unilaterally, without the annuitant's consent, that the petitioner's former spouse should receive 40 percent of the petitioner's gross monthly annuity.

The OPM advised the petitioner that unless he objected within 30 days, the requirements of the court order would be fulfilled. The

petitioner objected and the OPM issued a final decision. The petitioner then appealed, timely and in turn, to the Merit Systems Protection Board Administrative Judge, the Merit Systems Protection Board, and the U.S. Court of Appeals for the Federal Circuit.

Neither the OPM nor any reviewing authority directly addressed, for the record, the apparent conflict between the federal courts definition for annuities and the statute (as it has been interpreted and administered by the OPM) nor the apparent inequity resulting therefrom. This notwithstanding the following statements and allegations included in appeals by the petitioner:

"It is unconscionable that any arm of the federal government may lawfully classify a federal annuity as property or as not property, whichever is most detrimental to the annuitant."

"An attempt in a federal court to treat and categorize federal annuities as property failed,

resulting only in a determination that the COLA portion of federal annuities is not property. (According to an article in the Sept. 1984 issue of 'Retirement Life', Federal Judge Thomas Hogan, of the U.S. Court for the District of Columbia, ruled that there is no protected property interest in the COLA portion of federal annuities."

"More recently, the federal government defined federal annuities as compensation. (According to an article in the May, 1989 issue of 'Retirement Life', in connection with a case regarding the taxation of federal annuities by states, the Supreme Court of the United States, made it clear, in a majority decision, that the annuity of a federal retiree is compensation."

"Assumptions that the federal annuity is property" (by the state and the OPM) "fly in the face of definitions made in the federal judicial system."

"The effect of the U.S. Court definitions should have been addressed by the state court

and the OPM prior to their actions in this matter. There is no undisturbed authority for withholding a portion of my annuity payments from me."

"The statement requiring the annuity to be distributed pursuant to 'a court approved settlement agreement' (within the statute) does not permit the transfer of non-existant property rights. The statement does, however, permit the exchange of compensation (federal annuity) for property when this is incident to a property settlement agreement."

"The statute may be interpreted in compliance with the compensation (as opposed to property) definitions provided by the federal courts."

ARGUMENT FOR WRIT

Neither the OPM nor any reviewing authority has addressed, in the record, the apparent conflict between the federal court's definition

for annuities and the questioned statute (as it has been interpreted and administered by the OPM).

It is therefore believed that the Writ of Certiorari is in accord with the Supreme Court rule 10.1.(c).

And, the writ should be accomplished because of inequities described in "Questions Presented."

Note: Pursuant to Fed. Cir. R. 47.8, this deposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

92-3479

DELL O. MCCUAIG,
Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,
Respondent.

JUDGEMENT

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARD in CASE NO(S). SE0831920094I-1

This CAUSE having been considered, it is

ORDERED and ADJUDGED:

Per Curiam (NIES, Chief Judge, BENNETT, Senior Circuit Judge, and CLEVENGER, Circuit Judge):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED_____ _____
Francis X. Gindhart, Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, KING COUNTY

In Re the Marriage of:	)	
	)	
DEL OAK MCCUAIG,	)	NO. 88-3-09411-1
	)	
Petitioner	)	
	)	
vs.	)	
	)	
HWA CHA MCCUAIG,	)	QUALIFIED
	)	DOMESTIC
	)	RELATION
	)	ORDER
Respondent.	)	

WHEREAS, this court has jurisdiction over all parties to this action and jurisdiction over the subject matter of the Order in this dissolution action;

WHEREAS, the parties to this Order and the court intend this Order to be a Qualified Domestic Relations Order (hereinafter "Order") as that term is used in the Retirement Equity Act of 1984, as amended, and intend that the provisions of this Order are to be administered and interpreted in accordance

with that Act;

NOW, THEREFORE, it is hereby ordered by the court as follows:

1. Definitions. The following are the definitions used in this Order:

A. "Participant": Del Oak McCuaig
915 Adams Street
Port Townsend, WA
SS#: 535-12-1448

B. "Alternate Payee": Hwa Cha McCuaig
1808 South 308th St
Federal Way, WA

SS#: 535-48-0724
Relationship to Participant:Former Spouse

C. "Plan": The U.S. Government
Civil Service Retirement
System

D. "Plan Administrator":
U.S. Office of Personnel
Management (OPM)
Retirement Programs
Washington D.C. 20415

2. This Order is entered into pursuant to R.C.W. 26.09 governing division of marital property (as that term is defined therein: between spouses and former spouses in dissolution actions.

3. This order hereby creates and

recognizes as to the above Plan the existence of the Alternate Payee's rights to receive the following portion of the participant's benefits:

Alternate Payee is awarded and shall receive 40 percent (40%) of Participant's gross monthly annuity, reduced for survivor's annuity.

4. Upon notice to the Plan and at the Alternate Payee's election, from and after the date of this Order, with respect to the Alternate Payee's interest in the Plan created and recognized in Paragraph 3 of this Order above, the Alternate Payee shall have the sole and exclusive right to the following:

A. To elect a post retirement survivor's annuity to the extent of the interest awarded her in Paragraph 3 of this Order.

B. The Alternate Payee shall be treated as the surviving spouse, to the extent of the interest awarded her in Paragraph 3.

5. The Plan Administrator shall be provided with a copy of the Order by the counsel for the Alternate Payee. Upon receipt, the Plan Administrator shall:

A. Immediately notify the Participant and Alternate Payee of:

1. The receipt of this Order; and

2. The Plan's procedures for determining whether this Order is QDRO.

B. Within a reasonable period of time, determine if this Order is a QDRO, and notify the court, Participant, and Alternate Payee of such determination.

6. The Alternate Payee shall include all benefits received by her pursuant to this order as and when received by her in her gross income and the Participant need not do so. For the purposes of Section 72 and 402(a)(1) of the Internal Revenue Code, the Alternate Payee and not the Participant shall be treated as distributee of any distribution or payment

made to her by any Plan pursuant to this Order.

7. It is intended by this Order that the interest of the Alternate Payee awarded to her be segregated from that of the Participant and paid to the Alternate Payee as set forth in this Order irrespective of any election made by the Participant.

8. Participant and Alternate Payee shall advise the Plan of any change of address.

9. The interest awarded to Alternate Payee herein shall not be revoked by the Participant, and the Participant shall not engage in any future conduct as Plan Participant, either alone or in concert with the Plan Administrator so as to deprive Alternate Payee of the maximum amount of benefits allowable.

10. The court retains jurisdiction over this matter to amend this Order to establish or maintain its status as a QDRO under the

Retirement Equity Act of 1984, as amended.

DONE IN OPEN COURT this 14TH day of November , 1990.

_____

Judge JOAN E. DUBUQUE

Presented by:
STEAD, VOGEL & EIDE

_____

Ernest B. Vogel, WSB#988
Attorney for Alternate Payee

Approved as to form:
FORSHAUG, McGORAN & SAWYER

_____

Dale B Sawyer, WSB#983
Attorney for Participant

No. 92-1722

Supreme Court, U.S.
FILED
MAR - 8 1993
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

DELL O. McCUAIG - PETITIONER

vs.

OFFICE OF PERSONNEL MANAGEMENT - RESPONDENT

SUPPLEMENTARY APPENDIX

TO THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

SUPPLEMENTARY APPENDIX

Dell O. McCuaig
P.O. Box 443
Quilcene, WA 98376
(206) 765-4621

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DELL O. MC CUAIG, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency. (CSA 1 566 075)	)	DOCKET NUMBER SE0831920094-I-1 DATE: Jun-2 1992

Dell O. McCuaig, Quilcene, Washington, pro se.

Ernest B. Vogel, Esquire, Federal Way, Washington, for the intervenor.

Kenneth R. Brown, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on February 25, 1992, because it

does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SEATTLE REGIONAL OFFICE

DELL O. MC CUAIG, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency. (CSA 1 566 075)	DOCKET NUMBER SE-0831-92 -0094-I-1 DATE: February 25, 1992

Dell O. McCuaig, Quilcene, Washington, pro se.

Ernest B. Vogel, Esquire, Federal Way, Washington, for the intervenor.

Kenneth R. Brown, Washington, DC, for the agency.

BEFORE

Sidney E. Farcy
Administrative Judge

INITIAL DECISION

On December 9, 1991, Dell O. McCuaig filed an appeal from a reconsideration determination of the Office of Personnel Management that found

his former spouse was entitled to a portion of his retirement benefit under a qualifying domestic relations order.[1] Appellant's former spouse, Hwa Cha McCuaig, was allowed to intervene in the action under 5 C.F.R. § 1201.34, since her interest in the retirement benefit is directly affected by the appeal.[2] The Board has jurisdiction over this matter pursuant to 5 U.S.C. §§ 7701 and 8347 (d) and 5 C.F.R. § 831.110 (1991).

Appellant did not request a hearing of his appeal, which was decided based upon the written submissions of the parties.[3] For the reasons set forth below, the reconsideration determination is AFFIRMED.

ANALYSIS

Background facts

Appellant has been retired from Federal

---

[1] Appeal file tab 1.

[2] Appeal file tabs 6, 7, and 8.

[3] Appeal file tab 1.

service since 1973.[4] In November of 1990 appellant and intervenor were divorced and the resultant property settlement included a document captioned "Qualified Domestic Relations Order," which awarded intervenor a percentage of appellant's retirement benefit and provided a survivor annuity.[5] Intervenor ("Alternate Payee" in the court order) was specifically awarded ". . . 40 percent (40%) of Participant's gross monthly annuity, reduced for survivor's annuity" and the option "to elect a post retirement survivor's annuity to the extent of the interest awarded her in Paragraph 3 of this Order." The Office of Personnel Management determined that this Order constituted a fqualifying court order under 5 U.S.C. § 8345(j) and 5 C.F.R. § 831.1704 and affirmed this

---

[4] Appeal file tab 5, subtab 6.

[5] Appeal file tabs 1 and 5. Appelant had previously elected a survivior annuity for intervenor, but had sought to terminate it following the dissolution of their marriage. Appeal file tab 1.

determination on reconsideration.[6] This appeal followed.

Legal standard

As pertinent to this appeal, the statute in question provides that:

> Payments under this subchapter which would otherwise be made to an . . . annuitant based upon his service shall be paid (in whole or in part) by the Office to another person if and to the extent expressly provided for in the terms of any court decree of divorce, annulment, or legal separation, or the terms of any court order or court-approved property settlement agreement incident to any court decree of divorce, annulment, or legal separation.

5 U.S.C. § 8345(j)(1)

Regulations promulgated by the Office of Personnel Management provide that the agency will review the court order to determine whether it is the first order terminating the marriage and whether it includes the following: an express statement that the retirement benefit is to be divided and/or that a retirement benefit

---

[6] Appeal file tab 5.

is the source of payment; a statement that indicates it contemplates direct payment of the benefit by the United States; a statement that a fixed amount is to be paid, or that a readily ascertainable amount is to be paid, such as a percentage of the annuity. 5 C.F.R. § 831.1704 (1991).[7] In addition, if the order awards a former spouse annuity, it will be reviewed to determine if the marriage terminated prior to May 7, 1985, or if certain other events occurred before that date. *Id.*

Appellant's argument

Appellant raises three basic arguments. First, he contends that Federal court decisions hold that an annuity is compensation and not property, and hence, Congress may not authorize

---

[7] That portion of the regulation requiring that the order dividing the property be part of the first order dissolving the marriage and, in essence, precluding bifurcated proceedings has been invalidated by the Board where the order is the the first order relating to the division of the marital estate. *Love v. Office of Personnel Management,* 46 M.S.P.R. 641 (1991), *review granted,* 935 F. 2d 279 (Fed. Cir. 1991) (Table).

the division of a retirement annuity in a property settlement or divorce proceeding.[8] Second, he submits that given the length of his service, compared to the length of his marriage, the division ordered by the court is unreasonable.[9] Third, he urges that the statute is limited to court approved property settlement agreements and thus, in the absence of the annuitant's agreement, no distribution of the annuity may be made.[10] None of these arguments is persuasive.

Analysis

In the absence of a clear conflict with a Federal statute, state law governs in the areas of domestic relations, including such matters as the distribution of property in the course of the dissolution of a marriage. *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581 (1979); *In re*

---

[8] Appeal file tab 1, subtab 3.

[9] Appeal file tab 5, subtabs 3 and 4.

[10] Appeal file tab 10.

Marriage of Fithian, 10 Cal. 3d 592, 517 P.2d 449 (1974), *cert. denied*, 419 U.S. 825, *reh. denied*, 419 U.S. 1060 (1974). Congress, however, has the authority to determine the character of a federally created benefit, such as the retirement annuity at issue here. *Hisquierdo*, at 590. In enacting the legislation in question, Congress specifically provided for distribution of the annuities in accordance with the orders of State courts in order to avoid any frustration of domestic relations policy via the Supremacy Clause of the United States Constitution and existing law, which insulated retirement annuities from legal process. S. Rep. No. 1084, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S.C.C.A.N. 1380, 1381. That Federal courts may have treated retirement annuities or related benefits differently in other contests does not undercut the unequivocal statement of 5 U.S.C. § 8345(j) and the Congressional intent to allow state courts to treat these benefits as property subject to

distribution.

Appellant's argument that the dividison of his annuity ordered by the court is unfair or inappropriate is addressed to the wrong forum. To the extent that he seeks to challenge the validity of the property division, his argument should be addressed to the court which issued the order. *See* 5 C.F.R. § 831.1709(b) (1991) (providing for withholding of awarded annuity funds if an action challenging the validity of the order is filed within 30 days of OPM's notice to the annuitant). I note in passing, however, that while appellant's argument concerning the *pro rata* distribution of this annuity is appropriate for purposes of determining the character of the property (community or separate), under Washington State law all property is available for distribution, regardless of its character. *Donovan v. Donovan,* 25 Wash. App. 691, 612 P.2d 387 (1980) (pro rata approach to characterization of retirement benefits); *Friedlander v. Friedlander,* 80 Wash. 2d 293,

494 P.2d 208 (1972) (availability of all property).

Appellant's final argument is that the distribution in question did not arise from a property settlement agreement and that the statute only contemplates distributions in compliance with a court-approved property settlement agreement.[11] He argues that is the intent of the statute were to honor all court orders issued in the course of a dissolution of marriage, it would be unnecessary to specifically mention agreed settlements. I do not find this argument to be persuasive. The statute is phrased in the disjunctive and plainly states that either a division of property imposed by the court or one reached by mutual agreement and approved by the court will be honored. That the statute might have been more concisely worded does not detract from its plain meaning.

---

[11] Id.

Qualifying court order

While not directly addressed by appellant, I have reviewed the order to determine whether it complies with the requirements of the statute and the regulations. In this case, the order expressly provides for the award of a percentage of appellant's annuity to the intervenor and provides for direct payment of that benefit to the intervenor by OPM, and that it was entered after the effective date of the law, all in conformity with the statute and regulation. Thus, I find that the order is a qualifying court order.

DECISION

The agency's reconsideration decision is AFFIRMED.

FOR THE BOARD: _____

Sidney E. Farcy
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on March 31, 1992, unless a petition for review is

filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow will tell you how and when to fiel with the Board or the federal court. These instrucitons are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW, Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court before this decesion becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.